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12 Fortis Capital, LLC and Daniel Rupp

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN JOSE DIVISION

16 RHONDA HARRISON,

17 Plaintiff,

18 vs.

19 CURTIS O. BARNES, P.C.,
20 CURTIS O. BARNES, FORTIS
21 CAPITAL, LLC, and DANIEL
22 RUPP,

23 Defendants.

CASE NO.: C07 05529 JF

**DEFENDANTS' REPLY
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION TO SET
ASIDE CLERK'S DEFAULT
(F.R.C. P. 55(c))**

Date: April 18, 2008

Time: 9:00 a.m.

Crtrm.: 3, 5th Floor

The Honorable Jeremy Fogel

1 The Plaintiff has not provided any basis for denying the present motion to
2 set aside the Clerk's default. In fact, Plaintiff admits that she sought and obtained
3 the default of Defendants Curtis O. Barnes, P.C., Curtis O. Barnes, Fortis Capital,
4 LLC and Daniel Rupp ("Defendants") during the brief twelve day period when the
5 Defendants were finalizing their representation with their counsel. Despite
6 repeated requests to stipulate to set aside the default so that an Answer could be
7 filed and the parties could proceed with their pretrial obligations, Plaintiff and her
8 counsel have refused to cooperate, thereby burdening the Court with this motion
9 and forcing Defendants to incur needless attorneys' fees.

10 Good cause exists for setting aside the default. It is undisputed that the
11 initial delay in filing a response to the Complaint was a result of the parties'
12 ongoing settlement discussions. It is also undisputed that the brief delay in
13 retaining Defendants' present counsel was caused when the Defendants were not
14 aware that their signed engagement agreement and retainer had been lost in the
15 mail. It was reasonable for counsel for Defendants to refrain from contacting
16 counsel for Plaintiff until the engagement was formalized.

17 The Defendants have meritorious defenses and they intend to assert them
18 with vigor. All of Plaintiff's allegations in this case are based upon the contents of
19 alleged collection phone calls. Thus, all of the claims will turn on the credibility
20 of the Plaintiff and certain third parties. No prejudice will result to Plaintiff if the
21 default is set aside so that the merits of the alleged claims can be addressed.

22 Rather than respond to the issues raised by this motion, the opposition
23 papers filed by Plaintiff and her counsel are filled with wholly irrelevant and
24 unsupported assertions about the alleged conduct of Defendants and their counsel
25 in other cases. Plaintiff and her counsel may believe that it serves some strategic
26 purpose to inject these irrelevant allegations into this case. They may believe that
27 by filling the record with drivel and by increasing the cost of the defense of this
28

1 case, they will increase their settlement leverage. Or, perhaps the act of launching
2 ad hominem attacks against Defendants and their counsel simply has a cathartic
3 effect on Plaintiff or her counsel. But the allegations made against Defendants in
4 other cases (like those made in this case) do not amount to evidence of anything.
5 They are not relevant to the determination of whether the default should be set
6 aside in this action.

7 For these reasons, Defendants respectfully request that the Court enter an
8 Order, pursuant to Rule 55(c) of the Federal Rules of Civil Procedure, setting
9 aside their default.

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11 DATED: April 3, 2008

SIMMONDS & NARITA LLP

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14 By: s/Tomio Narita
15 Tomio B. Narita
16 Attorneys for Defendants
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